

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77 7101

To be Argued by
Maryellen Weinberg

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
MIRIAM WINTERS,

Plaintiff-Appellant

-against-

ABE LAVINE, et al

Defendants-Appellees
-----X

BRIEF FOR APPELLEE STATE
COMMISSIONER

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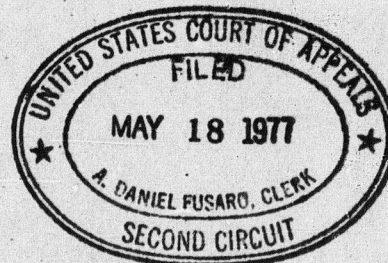


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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
MIRIAM WINTERS, :
Plaintiff-Appellant, : Docket No. 77-7101
-against- :
ABE LAVINE, et al :
Defendants-Appellees :
-----X

BRIEF FOR APPELLEE STATE
COMMISSIONER

Questions Presented

1. Whether appellant's claim that appellee State Commissioner improperly denied her medicaid reimbursement for Christian Science nursing care is barred by res judicata?
2. Whether the three judge Court correctly held that it should abstain from hearing appellant's claim that New York's denial of medicaid reimbursement for treatments by Christian Science practitioners is unconstitutional until the State Courts have interpreted Section 365-a of the New York Social Services Law regarding such claim?

Statement of the Case

Appellant appeals from an order of a statutory three judge court entered in the office of the Clerk of the United States District Court for the Eastern District of New York on February 1, 1977 on remand from the United States Supreme Court, 45 U.S.L.W. 3431. Appellant had commenced a Civil action pursuant to 42 U.S.C. §1983 seeking to declare unconstitutional and enjoin the enforcement of New York Social Services Law, §365-a on the grounds that the statute, as construed, deprives her of freedom of religion in violation of the First Amendment, and is in conflict with federal regulations, 45 C.F.R. §249.11, because appellees have refused to make medicaid reimbursement to a Christian Science nurse and Christian Science practitioner for services rendered to her.

Appellant had also sought class action designation which was denied. The First Church of Christ, Scientist in Boston, Massachusetts moved to participate as amicus curiae in opposition to this application on the ground that appellant is not a member of the Church and therefore can not speak for it. The Church also opposed appellant's claim for medicaid payment for Christian Science practitioners on the ground that this claim is contrary to its official policy because such services are religious rather than medical in nature (Affidavit of J. Burroughs Stokes).

Decisions Below

The Supreme Court

The United States Supreme Court dismissed appellant's appeal from the order of the three judge court, and remanded the case for entry of an order appealable to this Court, ___U.S.____; 45 U.S.L.W. 3431, December 13, 1976.

The Three Judge Court.

Judges Bartels and Hays voted to dismiss the complaint with regard to appellant's claim for medicaid payments to the Christian Science nurse on the ground of res judicata by reason of a State proceeding between the same parties, Winters v. Commissioner of Social Services, 49 A.D. 2d 843 (1st Dep't.1975) (A-108),* and abstained from deciding her claim for reimbursement for the Christian Science practitioner until the State Courts have spoken on the same issue in a pending State case also brought by appellant (A.56). Judge Dooling, concurred as to the Christian Science nurse claim but dissented as to abstention on the practitioner claim, stating that he would dismiss on the merits on the ground that federal regulations (42 C.F.R. §249.10[b][17]) permit payments only for services recognized by state law and New York Law does not permit medicaid reimbursement for the services of unlicensed persons (A.89,95).

*Reference is to appellant's appendix.

Factual Background

Appellant, an adult who lives as a recluse in the St. George Hotel in Brooklyn (H.M.3)* is a recipient of public assistance. She claims to be a follower of the beliefs of Christian Science, although not a member of the Chrisitan Science Church (A-14) and chooses not to avail herself of the services of physicians and registered nurses, resorting instead to treatment by Christian Science nurses and practitioners. In furtherance of her desire to have the cost of these treatments paid by medicaid she has commenced three law suits in the State and federal courts. The State proceedings were commenced prior to October 8, 1974, when the district court action resulting in the instant appeal, was commenced, and are relevant to understanding the instant appeal.

A. The Christian Science Nurse Case

On May 28, 1974, appellant commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules seeking to annul a determination dated February 20, 1974 (A.101) by appellee State Commissioner of Social Services after a statutory hearing, which affirmed a decision of the New York City Department of Social Services denying appellant's

*Reference is to minutes of hearing held

request for the payment of the claimed cost of Chrisitan Science nursing care.

Allegedly because of her reclusive habits, appellant did not appear at the hearing requested by her nor did she want a home hearing which was offered (H.M.3). The only testimony on her behalf was given by her attorney, the counsel below and on this appeal. There was no actual proof of the rendition of any nursing services other than her attorney's attempt to buttress the claim by his own assertions.

In the Decision After Fair Hearing, dated February 20, 1974 (A.101) appellee State Commissioner affirmed the City Department's determination denying payment for the services of a Christian Science nurse on the ground that the Social Services Law and Departmental Regulations make no provision for such payment for such services, without determining the question as to whether such alleged services were rendered and were necessary.

In opposition to appellant's contention in the Article 78 proceeding that the denial of medicaid payments for the Christian Science nurse was unconstitutional, the State Commissioner asserted inter alia, that under federal regulations Christian Science care is not included in the range of services covered

by State medicaid program unless "recognized" by State Law 45 C.F.R. §249.10(b)(17)(iii); and that New York's medicaid law, (Social Services Law §365-a) includes only services of a "registered nurse."

The Appellate Division held that the request for payment of the cost of Christian Science nursing care was properly denied. That Court held that:

"Aside from the fact that a Christian Science nurse is not classified as a registered nurse (Education Law §6901 et seq.), petitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law §365-a, since there is insufficient in the record to indicate either the nature of her illness or of the treatment which she received."
49 A.D. 2d 843 (1st Dep't.1975) (A108).

A notice of appeal to the New York Court of Appeals on constitutional grounds was dismissed by that Court sua sponte on the ground that no substantial constitution question was directly involved, 39 N.Y. 2d 832 (1976). Appellant then served a notice of appeal to the United States Supreme Court from the order of the Court of Appeals on December 13, 1976 the Supreme Court dismissed the appeal _____ U.S. _____, 45 U.S.L.W. 3431.

B. The Practitioner Case

On September 13, 1974 appellant commenced another Article 78 proceeding to annul a determination made by the State Commissioner on May 30, 1974, after a statutory hearing which

affirmed a denial by the New York City Department of Social Services of her request for payment for the services of a Christian Science practitioner, Winters v. Commissioner of the New York State Department of Social Services and Commissioner of the New York City Department of Social Services, Sup. Ct. NY Co., Index No. 41820/74. The State Commissioner answered and defended on the same grounds as in the nurse case.

The practitioner case is still pending in the New York County Supreme Court (App.Brf, p.8). On April 14, 1975 a motion to dismiss by the City Department was denied with leave to answer. Pursuant to Section 7804(f) of the New York Civil Practice Law and Rules, petitioner (appellant herein) may re-notice her petition for hearing by the Court.

POINT I

APPELLANT'S CLAIM THAT APPELLEE
STATE COMMISSIONER IMPROPERLY
DENIED HER MEDICAID REIMBURSEMENT
FOR CHRISTIAN SCIENCE NURSING
CARE IS BARRED BY RES JUDICATA.

The three judge court's rejection of appellant's claim regarding Christian Science nursing care on the ground of res judicata must be affirmed. The same contention was raised in another proceeding among the same parties, and was reviewed and rejected by the United States Supreme Court, Winters v.

Commissioner of Social Services, No. 76-81, 45 U.S.L.W. 3431,
December 13, 1976.

Although appellant argues in her brief to this Court (p.9) that res judicata in a state proceeding may not be used to deny her access to federal courts, she omits to mention that the same constitutional claims which she raised below in the instant action were made to the highest federal courts on review of the state proceeding.

Appellant concedes that the same issues were raised in the state court as herein (Appl't Br.pp.8-9,10), although those courts chose to decide the matter on nonconstitutional grounds. However, "[f]or purposes of res judicata, the significance of what a court says it decided is controlled by the issues that were open for decision." Angel v. Bullington, 330 U.S. 183, 187 (1947). The three-judge court below found that appellant's claim as to the nurse was clearly and explicitly submitted to the Appellate Division (A-50). As this court held in Lecci v. Cahn, 493 F.2d 826 (2d Cir.1974):

"The fact that affirmances in the state courts were without opinion or without specific reference to the constitutional question is of course immaterial. Grubb v. Public Util. Com'n, 281 U.S. 470, 477-478, 50 S. Ct. 374, 74 L.Ed 2d 972 (1930); Tang v. Appellate Division, 487 F.2d 138 (2d Cir.1973)."

In view of the United States Supreme Court's dismissal of her appeal from the order of the New York Court of Appeals, her attempts to cast doubt on the res judicata effect given to judgments pursuant to Article 78 in New York (App'lt Br. pp.12-13) is inapplicable. There can be no doubt as to the res judicata effect of a judgment by the United States Supreme Court, England v. Board of Medical Examiners, 375 U.S. 411, 419 (1964); Lecci v. Cahn, supra.

Nor is there merit to appellant's attempt to avoid the bar of res judicata because the instant action was brought under 42 U.S.C. §1983 (Applt. Br.p.14). In Preiser v. Rodriguez, 411 U.S. 475, 497 (1973), the Supreme Court stated that principles of res judicata are fully applicable to civil rights actions. cf. Lecci v. Cahn, supra, also a civil rights action. Dispositive also is Expert Electric Inc. v. Levine, 2d Cir. May 12, 1977.

POINT II

THE THREE JUDGE COURT CORRECTLY HELD THAT IT SHOULD ABSTAIN FROM HEARING APPELLANT'S CLAIM THAT NEW YORK'S DENIAL OF MEDICAID REIMBURSEMENT FOR TREATMENTS BY CHRISTIAN SCIENCE PRACTITIONERS IS UNCONSTITUTIONAL UNTIL THE NEW YORK COURTS HAVE INTERPRETED SECTION 365-a OF THE NEW YORK SOCIAL SERVICES LAW.

Appellant's dilemma (Brief p.19-20) which allegedly arises from the combination of the principle of the res judicata

and the doctrine of abstention is of her own making. She was not required to proceed in the state courts under Article 78 or by other means before commencing this action in the federal court, England v. Board of Medical Examiners, 375 U.S. 411, 430. Indeed she did not even have to exhaust her state administrative remedies, since, as the three judge court noted (A.57) New York does not include Chrisitan Science treatment in the range of services covered by medicaid and is not required to by federal law. Therefore appellant could have challenged the federal statute and regulations before the three judge-court, but instead chose to challenge the application of Social Services Law, §365-a.

The three-judge court could decide only the issues presented to it. It therefore was constrained to dismiss appellant's nurse claim because of res judicata and to abstain as to the practitioner claim because there was a pending state proceeding in which the same issue was raised, in reliance on Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941) (A-52-55). A similar situation occurred in Carey v. Sugar, 425 U.S. 73, 77-78 (1976). The Supreme Court vacated a judgment declaring a state statute unconstitutional and directed a three-judge court to abstain from a decision of the federal constitutional issues until the state courts had construed the statute in question, despite recognizing that "[i]t may be

that the three-judge District Court below was correct in its 'forecast' of state law.

Furthermore, the fact that the State Article 78 proceeding seeking to annul the determination denying reimbursement for practitioner's services has been pending for over two years shows the speciousness of appellant's argument that she was forced into the situation in which she now finds herself (Appl't Br.pp.19-20) because of the short statute of limitations for bringing an Article 78 proceeding. The res judicata-abstention situation developed because of the peculiar way in which counsel chose to proceed. He now asks this Court to bail him out (Applt. Br.p.20).

Even though, as appellant contends (Appl't Br.pp.17-18) the State courts may well decide the practitioner case against her, this court can not give her judgment on the merits as she requests (Applt Br.Pt.II), the merits not having been reached by the three-judge court below (A-44), cf. Carey v. Sugar, supra. Plainly this appellant cannot be permitted to engage in this double assault by bringing the actions in the two courts. Having instituted action in the State seeking the relief, she must be held to that choice.

CONCLUSION

FOR THE REASONS ABOVE STATED,
THE ORDER OF THE THREE-JUDGE
COURT SHOULD BE AFFIRMED.

Dated: New York, New York
May 19, 1977

Respectfully submitted,

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LA VERNE POLLARD being duly sworn, deposes and says
that she is employed in the office of the Attorney General
of the State of New York, attorney for Respondent Toia
herein. On the 19th day of May , 1977 s he served
Three (3) copies
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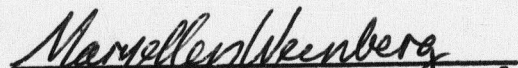
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Sworn to before me this
19th day of May 1977



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Assistant Attorney General
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